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(Reversed on other grounds) *State* v. *Armour & Co.*, (Minn. 1912) 136 N. W. 565.

A like conclusion was reached in *City of New York* v. *Biffle*, 91 N. Y. Supp. 737, holding that an ordinance penalizing "the use of incorrect scales" made the dealer liable even if an innocent mistake were shown to have occurred. But somewhat limiting this doctrine, see See *City of Newark* v. *East Side Coal Co.*, 77 N. J. Law. 732. There the offence was a "delivery of less than a ton for a ton of coal," and the dealer was held excused by showing that the coal was intended for a customer who had ordered less than a ton and was by mistake delivered to the complainant who had ordered a ton.

WILLS—GIFT OVER TO SURVIVORS—CONSTRUCTION.—Testator devised and bequeathed his estate equally amongst his children from and after the decease of his widow, to whom he had given a life interest, and then added a clause after the testatum and just before the execution that, "in case of the death of one or more of my children" the share or shares of the children so dying should be divided between the survivors. *Held*, that this clause referred to death only in the testator's lifetime, and all the children surviving the testator took vested interests which were not to be diverted by death during the life estate of the widow. *In re Poultney. Poultney* v. *Poultney*, L. R. [1912] 1 Ch. D. 245.

A device to "survivors" implies a contingency—that only a part of the beneficiaries may survive. In the event that the testator does not specify the contingency or condition which shall determine who are survivors, the question arises to what period or event did he refer, because death is not in itself a contingency but a certainty. *Edwards* v. *Edwards*, 15 Beav. 357, 362. If the words of survivorship are unexplained and have no apparent reference to the time of enjoyment or distribution, they are held to refer to the time of the testator's decease. This prevents a lapse of the bequest. *Stringer* v. *Phillips*, 25 Eng. Rul. Cas. 726. But these same words in a gift after a life estate are to be referred to the "period of division and enjoyment, unless there be a special intent to the contrary." *Cripps* v. *Wolcott*, 4 Madd. 11, 25 Eng. Rul. Cas. 727. And the American courts have generally held "that if there are intervening estates only those living when they terminate are survivors." ROOD, WILLS, § 660, cases n. 58. This rule would have governed the principal case, including as survivors only those living at the death of the life tenant, except that the court considered the unusual position of the clause of survivorship, as removing the case from the general rule. It was inserted just before the execution and was, to use the words of the court, "altogether detached from the clause which speaks of the decease of the widow, almost as much as if it were in a separate instrument." This was deemed sufficient to remove the presumption that the "period of division and enjoyment" should govern and upon considering that the remainders were vested at the decease of the testator (PAGE, WILLS § 659) and that vested interests are not to be diverted or cut down by doubtful expressions, but only upon clear evidence of testator's intent (1 JARMAN, WILLS (Ed. 6) 433, *Burnham* v. *Burnham*, 79 Wis. 557), the court construed "survivors" to refer to the death

of the testator. This same construction is followed in a number of American cases even though terms of survivorship are used in immediate conjunction or reference to a life estate or other period to take effect after testator's decease and before the bequest can be enjoyed. *Porter* v. *Porter,* 50 Mich. 456; *Aspy* v. *Lewis,* 152 Ind. 493; *Johnes* v. *Beers,* 57 Conn. 295.

WILLS—INDEFINITENESS—EFFECT.—Testatrix, who owned six leaseholds varying in value as well as in income and expenditure for ground rent and taxes, devised "one house" to one son, "one house" to another son and "one house" to a third son, and then devised a designated house to one daughter and two other designated houses to another daughter. *Held,* reversing the appellate division of the supreme court, that the will was not void for indefiniteness as to the devises to the sons, but that they were entitled to elect as to the house each would take in accordance with the order in which they were named in the will. *In re Turner's Will* (N. Y. 1912) 99 N. E. 187.

Where a gift comprises a definite portion of a large quantity, it is not rendered nugatory by the omission of the testator to point out the specific part which is to form such portion, the devisee or legatee being in such case entitled to select. So if a testator devise a messuage and ten acres of land surrounding it, part of a larger number of acres, the choice of the ten acres is in the devisee; *Hobson* v. *Blackburn,* 1 My. L. & K. 572. And this was a most ancient rule, for in SHEPPARD'S TOUCHSTONE, 251, we read that "if one be seized of two acres and grant one acre to A, then A shall elect," and in *Grace Marshall's case,* 40 Eliz., it was held that a devise of two acres of land out of four is a good devise and the devisee shall have full election. DYER, 281 a. n., 8 Vin. Abr. 48 pl. 11; *Peck* v. *Halsey,* 2 P. Wms. 387. And the devisee shall make the choice and no one else; *Jacques* v. *Chambers,* 2 Coll. 35. But the difficulty in the principal case was that there was more than one devisee and the third son would have no choice at all but would have to take what was left. But the court held that since each would have been good if standing alone, they should be taken separately and thus decided. The court cited for authority *Duckmanton* v. *Duckmanton,* 5 H. & N. 219, where the testator having two closes devised one to his elder son and one to his younger son; they tossed to see which should have the choice, and the court held that this was an exercise of the elder son's right to election.